Supreme Court of the United States

OCTOBER TERM, 1968

No. 749

ADOLPHO RODRIQUEZ,

Petitioner,

—v.—

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA, SACRAMENTO

Docket 9670

ADOLPHO RODRIGUEZ, PETITIONER

vs

UNITED STATES OF AMERICA, RESPONDENT

For Plaintiff:

A-30275
McNeil Island, Washington

For Defendant:

BASIS OF ACTION: Motion To Vacate Sentence Under 2255

JURY TRIAL CLAIMED ON

Date 1966	Plaintiff's Account	Received	Disbursed
2-15	Fee	$15.00	
2-18	Pd. Treas. U. S.		15-

Receipts, Remarks, Etc. J.S. 56

DATE 1966	FILINGS—PROCEEDINGS
2-15	1. Filed Motion, Under 2255.
6-27	Ordered that petitioner's application and Motion for relief under Title 28 U.S.C. 2255 be, and the same is hereby, denied. (TJM)
	2. Filed Memorandum and Order.

DATE 1966	FILINGS—PROCEEDINGS
7-11	Received application for leave to proceed in forma pauperis with the filing of notice of appeal.
10-25	3. Filed Memorandum and Order Allowing Appeal in Forma Pauperis. (TJM) Filed letter to Judge McBride. Reg. Ordered that petitioner be allowed to proceed with his appeal without prepaymento of fees and costs and giveing of security therefor. (TJM) 4. Filed Application For Leave To Proceed In Forma Pauperis
11-18	Mailed Record To Clerk, Ninth Circuit Court of Appeals.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SACRAMENTO, CALIFORNIA

Case # Cr 13611

ADOLPHO RODRIGUEZ, ETTA MAE RODRIGUEZ, ALBERTO AMARO, JUAN BARACAN, APPELLANTS

vs

UNITED STATES OF AMERICA, APPELLEE.

NOTICE OF APPEAL

TO: THE ABOVE ENTITLED COURT;
GREETINGS:

Comes now ADOLPHO RODRIGUEZ and the above named appellants, who were convicted and sentenced on June 20, 1963 in the above captioned Court by the Honorable Judge McBride;

Appellant gave oral notice of appeal.

Appellant is herein giving formal notice of appeal to the U.S. Court of Appeals for the Ninth Circuit, that bill of exceptions, warrants of arrest, and all the trial transcripts be forwarded to said court of appeals located in San Francisco, California.

That same be filed as notice of appeal according to rules on appeal in all such matters.

POINTS RAISED ON APPEAL

That appellants were arrested in violation of Constitutional Guarantees of Fourth Amendment, and Section 3109, Title 18, U.S.C.A.

That there was insufficient evidence at trial to convict appellants.

That appellants are held in violation of the Fourteenth and Fifth Amendments of Constitutional guarantees.

Respectfully Submitted

/s/ Adolpho Rodriguez
ADOLPHO RODRIGUEZ
Appellant

Subscribed and Sworn to Before
Me This 7th Day of August, 1963

/s/ [Illegible]

U. S. Penitentiary Parole Officer
Parole Officer, U. S. Penitentiary, McNeil Island, Pierce County, Washington. Authorized by the Act of July 7, 1955 to administer oaths (18 U.S.C. 4004).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
NORTHERN DIVISION

—oOOo—

Cr. No. 13611

UNITED STATES OF AMERICA, PLAINTIFF

vs.

ADOLPHO RODRIGUEZ, ETTA MAE RODRIGUEZ, ALBERTO MORALES AMARO, RAMON AMARO VILLA, JUAN BAUTISTA BARRAGAN, and FRANCISCA DE GONTES CEJA, DEFENDANTS

Original Filed August 22, 1963
Clerk, U. S. District Court

MEMORANDUM AND ORDER

Adolpho Rodriguez, one of the defendants herein, has submitted to this Court a motion for permission to proceed in forma pauperis with an appeal from the Judgment entered in this case on June 20, 1963.

Federal Criminal Procedure Rule 37 (a) states a mandatory requirement that notice of appeal be filed within ten days aft r entry of Judgment. Compliance with this requirement is essential to the jurisdiction of the Court of Appeals. *United States* vs. *Robinson*, 361 U.S. 220 (1961).

The record contains no written notice of appeal within the prescribed ten day period. Petitioner claims that he gave oral notice of appeal, but such notice is insufficient to satisfy Rule 37 (a), which requires a signed writing. F.R. Crim. P. 37(a)(1). *Durel* vs. *United States*, 299 F. 2d 583 (5th Cir. 1962). Thus, petitioner has not complied with a mandatory prerequisite for perfecting an appeal to the Court of Appeals.

Leave to appeal in forma pauperis is not a right, but a privilege, the granting of which is in the sound discretion of the court to which the application is directed. *Adkins* vs. *DuPont*, 335 U.S. 331 (1948). Inasmuch as

the petitioner has not complied with a mandatory prerequisite for perfecting his proposed appeal and the said appeal is, therefore, futile, this Court will deny the motion for permission to proceed in forma pauperis therewith.

IT IS, THEREFORE, ORDERED that petitioner's motion for permission to appeal in forma pauperis from the Judgment entered in this case on June 20, 1963, be, and the same is, hereby denied.

DATED: August 22, 1963.

THOMAS J. MACBRIDE
United States District Judge

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
SAN FRANCISCO, CALIFORNIA

Cr. No. 13611

ADOLPHO RODRIGUEZ, PETITIONER

vs

UNITED STATES OF AMERICA, RESPONDENT

Received, Oct. 31, 1963, Frank H. Schmid, Clerk

AFFIANT IN FORMA PAUPERIS

TO: The above entitled Court, Honorable Justice Chambers thereof;

Adolpho Rodriguez having been duly sworn, according to law, deposes and says:—

That he is the petitioner named in the attached motion, and is a citizen of the United States of America, presently confined in the United States Penitentiary known as McNeil Island, located in the State of Washington, County of Pierce, and whose mailing address is P. O. Box 1000, Steilacoom, Washington.

That due and by virtue of said imprisonment he is without money whatsoever and has no means of obtaining the statutory fee required for filing his motion with which he moves this Court.

That he is wholly without money or property, real or personal, upon which process may issue, he having paid retained counsel for criminal trial purposes the cash sum of $2,500.00 and the following described property, to wit:

1.—One 1949 Chevrolet two ton truck.
2.—One 1954 Chevrolet pickup truck.
3.—One 1953 Chevrolet bus.
4.—One 1952 Cadillac automobile.
5.—Brothers-In-Law—$250.00.

All of which were included as attorneys fees at time of trial.

Affiant further submits that personal property of the value of $1,400.00 was left in trust with C. W. Carpenter, the Sheriff of Yuba City, Sutter County, California, who has failed properly to surrender the proceeds of said personal property to affiant, and by virtue of which your affiant is a poor and indigent person, and a pauper.

Wherefore, it is respectfully submitted and prayed that this Honorable Court waive the costs of filing fees upon the grounds herein above set forth.

Respectfully submitted,

/s/ Adolpho Rodriguez
Affiant

Subscribed and Sworn to Before Me
This 24th Day of October, 1963

/s/ [Illegible]

U. S. Penitentiary Parole Officer
Parole Officer, U. S. Penitentiary, McNeil Island, Pierce County, Washington. Authorized by the Act of July 7, 1955 to administer oaths (18 U.S.C. 4004).

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
SAN FRANCISCO, CALIFORNIA

Re: Cr. No. 13611

In the Matters of:—Ex Parte

ADOLPHO RODRIGUEZ, PETITIONER

vs

UNITED STATES OF AMERICA, RESPONDENT

Received, Oct. 31, 1963, Frank H. Schmid, Clerk

MOTION

TO: The above entitled Court; Honorable Justice Chambers, et al; and to the respondents herein;

Comes now Adolpho Rodriguez, the petitioner herein above named and hereafter referred to as petitioner, and respectfully moves this Honorable Court for an order to issue permitting and appeal to be filed for cause.

That said motion is made under the requirements of law pursuant to statute in such cases as defined by the United States Code and Rules of Appeal, and that said motion is herein made as a requirement of justice guaranteeing to an accused person the constitutional right to appeal in criminal cases as the one at bar.

Petitioner herein invokes and calls upon this Court for the protection of his appeal rights where an appeal has been defaulted through no fault of petitioner, and where the sentencing Court refuses to correct default; and where because of special circumstances, use of habeas corpus as an aid to an appeal over which Circuit Courts of Appeals has jurisdiction may fairly be said to be reasonably necessary in the interests of justice.

STATEMENT OF MATTERS AND LAW INVOLVED

Since justice can be given effect only through the application of rules, the fundamental principles of application of rules are given to a particular situation in criminal cases.

It is the Courts duty to determine in this case if the particular rules applied by the Court where sentence was

passed and where an appeal has been denied were the right rules, and whether they were correctly applied, or whether or not different rules affecting rights to appeal should have been applied.

BRIEF STATEMENT OF FACTS

Petitioner, Adolpho Rodriguez, was convicted in the United States District for the Northern District, Northern Division of California, at Sacramento, having been charged with the crime of narcotics, eleven counts. The accused entered a not guilty plea on eleven counts and was convicted by jury on the 20th day of June, 1963.

Petitioner was represented throughout his trial by counsel of his own choice, having paid said counsel a fee of $2,500.00, a 1949 Chevrolet two ton truck, a 1954 Chevrolet pickup truck, a 1953 Chevrolet passenger bus, a 1952 Cadillac automobile, and his brothers-in-law gave him $250.00.

At time of sentence petitioner was denied a motion for a new trial and was sentenced to a term of twenty (20) years. Petitioner was charged and tried with Roberto Amaro, Juan Barragon, other co-defendants on the same charge, one of whom was his wife, Etta Rodriguez. All were convicted and sentenced to terms in prison. Petitioner now makes this motion in his own behalf (Ex Parte) "Rodriguez."

At time of sentence petitioner informed his counsel that he desired to appeal his case, believing that he was framed while in the county jail awaiting a hearing on another different and distinct charge having no connection with the present narcotic conviction, and that his belief that he was framed by police on a false narcotics charge stems from the fact that while he was being held in the county jail for hearing in another matter the police planted an informer in petitioner's cell to make an acquaintance and to frame him after he was released from jail.

At time of sentence, and after petitioner informed his attorney of his desire to appeal, an oral notice of appeal was made in court at that time.

Petitioner was then held in the county jail to await transfer to the United States Penitentiary, having been

held for a period of thirty (30) days, before transfer was made. Petitioner is now confined in the United States Penitentiary at McNeil Island, located at mailing address known as Box 1000, Steilacoom, Washington, County of Pierce, where he has remained ever since.

Petitioner is a layman having no knowledge of law and procedure and believed that his attorney would handle all legal matters pertaining to his appeal application, and was awaiting word from the Appellate Court regarding such appeal.

On or about the 7th day of August, 1963 petitioner wrote to the Court wherein he was sentenced requesting information as to his appeal, stating to the Court that he had given oral notice of appeal at time of sentence.

In reply by letter dated August 23rd, the clerk of the court advised petitioner that he had not filed written notice of appeal (See Exhibit A) thereto attached and made a part of this petition.

Petitioner learned for the first time that such written notice of appeal is a requirement under rules of appeal, and has now learned for the first time that his attorney's services terminated at the conclusion of trial and sentence.

Petitioner has a just and good cause for appeal and his appeal was taken in good faith, and now complains that he has a defense and cause to be heard and no one to hear it.

Wherefore, petitioner prays this Honorable Court to issue an order directed to sentencing Court, setting aside default and permitting petitioner permission to perfect and present his appeal before this Court, or to grant filing habeas corpus within the jurisdiction of the Ninth Circuit Court of Appeals.

Particular attention is called to this Court regarding the wording of a letter petitioner received from the clerk of the sentencing Court regarding "privilege" of appeals. (See Exhibit A).

In this connection petitioner submits the following:—

Article Fourteen (14), of the Amendments to the United States Constitution since the Bill of Rights reads in part, to wit:—

"—All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state in which they reside. No state shall make or *enforce any law* which shall abridge the *privilege* or immunities of citizens of the United States. Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within it's jurisdiction the *equal protection of the laws.*"

An appeal is in the category of the constitutional provisions of equal protection of the laws. If they could deny *one* person an appeal and allow *others* to appeal, this is not equal protection of the law.

His "privilege" to appeal infers that he had a *privilege* to appeal his case within the ten (10) day limit—but because he thought his attorney took care of everything and caused him to default his appeal was no fault of petitioner, and under these circumstances the Court will restore his appeal rights under the constitutional provision cited above.

(Supreme Court Reporter 317 U.S. at Page 236)

The writ of habeas corpus may be used as a substitute for an appeal where, because of special circumstances, use of the habeas corpus as an aid to an appeal over which Circuit Courts of Appeals has jurisdiction may fairly be said to be reasonably necessary in the interests of justice. The writ is available to Circuit Courts of Appeals.

Respectfully submitted,

/s/ Adolpho Rodriguez
Petitioner

Subscribed and Sworn to Before Me
This 24th Day of October, 1963

/s/ [Illegible]

U. S. Penitentiary Parole Officer
Parole Officer, U. S. Penitentiary, McNeil Island, Pierce County, Washington. Authorized by the Act of July 7, 1955 to administer oaths (18 U.S.C. 4004).

* * * *

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Misc. 1806

ADOLPHO RODRIGUEZ, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

MEMORANDUM AND ORDER—Filed November 18, 1963

Petitioner, a federal prisoner, failed to file a timely notice of appeal from his conviction although an oral notice of appeal was noted by his attorney at the time of his sentencing. He seeks an order extending the time for filing an appeal or in the alternative a writ of habeas corpus.

An oral notice of appeal by attorney at time of sentencing is not sufficient compliance with Rule 37(a) of Federal Rules of Criminal Procedure. See *United States* vs. *Isabella*, 251 F.2d 223 (2nd Cir.), and *Durel* vs. *United States*, 299 F.2d 583 (5th Cir.).

The petition for extension of time to file an appeal is denied for lack of jurisdiction. *United States* vs. *Robinson*, 361 U.S. 220.

Treating the petition as an application for a writ of habeas corpus directed to me it is denied. Habeas corpus cannot substitute for an appeal. *Adams* vs. *United States, ex rel., McCann*, 317 U.S. 269.

/s/ Homer T. Bone
/s/ Richard W. Chambers
United States Circuit Judges

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
NORTHERN DIVISION

ATTACKING A SENTENCE IMPOSED BY THAT COURT

Case No. 9670
(To be supplied by the Clerk of the District Court)

See also Crim. 13611

ADOLPHO RODRIGUEZ # 30275
Full name and prison number of petitioner

vs.

UNITED STATES OF AMERICA
Name of respondent

MOTION PURSUANT TO SECTION 2255 OF TITLE 28
UNITED STATES CODE—Filed February 15, 1966

INSTRUCTIONS—READ CAREFULLY

In order for this motion to receive consideration by the District Court, it shall be typewritten (unless it is affirmatively made to appear that typing facilities are not available), signed by the petitioner and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, petitioner may finish his answer to a particular question on the reverse side of the page or on an additional blank page. Petitioner shall make it clear to which question any such continued answer refers.

Since every motion under sec. 2255 of Title 28, United States Code, must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Petitioners should therefore exercise care to assure that all answers are true and correct.

If the motion is made *in forma pauperis*, it shall include an affidavit (attached at the back of the form)

setting forth information which establishes that petitioner will be unable to pay the fees and costs of the 2255 proceedings. When the form is completed, *the original and one copy* shall be mailed to the Clerk of the U. S. District Court for the Northern District of California, Northern Division, 650 Capitol Avenue, Sacramento, California.

1. Place of detention United States Penitentiary, McNeil Island, Washington

2. Name and location of court which, and name of judge who, imposed sentence U. S. District Court, Sacramento, California—Thomas J. MacBride

3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
   (a) Indictment No. 13611
   (b) Violation of Federal Narc. Laws.
   (c) .....

4. The date upon which sentence was imposed and the terms of the sentence:
   (a) June 20, 1963.
   (b) 20 years
   (c) .....

5. Check whether a finding of guilty was made
   (a) after a plea of guilty .....
   (b) after a plea of not guilty X .....
   (c) after a plea of nolo contendere .....

6. If you were found guilty after a plea of not guilty, check whether that finding was made by
   (a) a jury X .....
   (b) a judge without a jury .....

7. Did you appeal from the judgment of conviction or the imposition of sentence?

8. If you answered "yes" to (7), list
   (a) The name of each court to which you appealed:
   I. .....
   II. .....
   III. .....

(b) the result in each court to which you appealed:

I. .....

II. .....

III. .....

(c) the date of each such result:

I. .....

II. .....

III. .....

(d) if known, citations of any written opinions or orders entered pursuant to such results:

I. .....

II. .....

III. .....

9. State concisely the grounds on which you base your allegation that the sentence which was imposed on you is invalid:

(a) I was "defrauded of my "known right" to appeal by retained trial counsel, Paul J. Melee.

(b) .....

(c) .....

10. State concisely and in the same order the facts which support each of the grounds set out in (9):

(a) It is well settled that an appeal from the judgment of a Federal District Court in a criminal case is a matter of right. *Coppedge* v. *United States*, 369 U.S. 438, 82 S.Ct. 917. It is also well settled that the sentencing court has discretion to ascertain whether a petition under Section 2255, presents a substantial question be-

(b) fore granting a full evidentiary hearing. *Sanders* v. *United States*, 373 U.S. 1, 20-21, 83 S.Ct. 1068 and *Moore* v. *United States*, 334 F.2d 25.

The standard required of employed counsel in a criminal case was set out in *Kennedy* v. *United States*, 259 F.2d 883 and it was held that a defendant is bound by acts of his counsel unless

(e) misconduct of counsel amounting to a breach of his legal duty to faithfully represent his client's interests is alleged and proven.

In the case at bar, the record will reflect that petitioner gave oral notice of appeal. Thereafter, petitioner's retained trial counsel failed to file a written notice of appeal in compliance with Rule 37 (a) (1), Federal Rules of Criminal Procedure, thereby "defrauding" petitioner of his "known right" to appeal. *Calland* v. *United States*, 323 F.2d 405.

It is to be observed that petitioner is of mexican decent, a citizen of the United States of America, who could not communicate in the English language (read, write or speak) at the time judgment was imposed. Petitioner was also incarcerated, without funds or the technical knowledge with which to exercise his "known right" of appeal. Thus, when trial counsel failed to file a written notice of appeal, after oral notice had been given, with the knowledge that petitioner could not comply with Rule 37 (a) (1), he did with intent and knowledge deprive petitioner of his right to appeal by fraud.

Petitioner was transported to the United States Penitentiary, where he is presently confined, to commence service of his sentence, with the sincere belief that his judgment of conviction was, in fact, on appeal.

Petitioner has diligently studied the English language during these past two years of incarceration, in order that he may effectively seek judicial redress in this matter.

WHEREFORE, based upon the foregoing, and all the records and files heretofore had in this matter; the attached exhibits; the edict of *Dillane* v. *United States*, 350 F.2d 732 (1965), and *Camp* v. *United States*, 352 F.2d 800, it is respectfully submitted that petitioner was defrauded by retained trial counsel of his "known right"

of appeal and that this Honorable Court vacate and set aside his judgment of conviction so that he would be restored to the status of one whom sentence has just been imposed, and who has ten (10) days in which to institute a direct appeal. In re-sentencing petitioner respectfully requests that this Honorable Court consider the time petitioner has already served.

Respectfully submitted,

/s/ Adolpho Rodriguez
ADOLPHO RODRIGUEZ

11. Have you previously filed petitions for habeas corpus, motions under section 2255 of Title 28, United States Code, or any other applications, petitions or motions with respect to this conviction? .....

12. If you answered "yes" to (11), list with respect to each petition, motion, or application

(a) the specific nature thereof:

I. Motion to proceed on appeal in forma pauperis

II. .....

III. .....

(b) the name and location of the court in which each was filed:

I. U. S. District Court, Northern District of Calif., Northern Division (see attached exhibit "A")

II. .....

III. U. S. Court of Appeals for the Ninth Circuit (see attached exhibit "B")

(b) the disposition thereof:

I. Denied

II. Denied

III. .....

(d) the date of each such disposition:

I. August 22, 1963
II. November 18, 1963
III. .....

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

I. .....
II. .....
III. .....

13. Has any ground set forth in (9) been previously presented to this or any other federal court by way of petition for habeas corpus, motion under section 2255 of Title 28, United States Code, or any other petition, motion or application? No.

14. If you answered "yes" to (13), identify

(a) which grounds have been previously presented:

I. .....
II. .....
III. .....

(b) the proceedings in which each ground was raised:

I. .....
II. .....
III. .....

15. Were you represented by an attorney at any time during the course of

(a) your aggarigment and plea Yes. .....
(b) your trial, if any Yes. .....
(c) your sentencing Yes. .....
(d) your appeal, if any, from the judgment of conviction or the imposition of sentence .....
(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed No. .....

16. If you answered "yes" to on or more parts of (15), list

(a) the name and address of each attorney who represented you:

I. Paul J. Melee, Sacramento, California
II. .....
III. .....

(b) the proceedings at which each such attorney represented you:

I. Plea
II. Trial
III. Sentence

17. If you are seeking leave to proceed *in forma pauperis*, have you completed the sworn affidavit setting forth the required information (see instructions, page 1 of this form)? Yes

/s/ Adolpho Rodriguez
Signature of Petitioner

)
) ss:
)

ADOLPHO RODRIGUES, being first sworn under oath, presents that he has subscribed to the foregoing petition and does state that the information therein is true and correct to the best of his knowledge and belief.

/s/ Adolpho Rodriguez
Signature of Affiant

Subscribed and Sworn to before me
this 17th day of January, 1966

/s/ [Illegible]

Parole Officer, U. S. Penitentiary, McNeil Island, Pierce County, Washington. Authorized by the Act of July 7, 1955 to administer oaths (18 U.S.C. 4004).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
NORTHERN DIVISION

—oOo—

Civil No. 9670

ADOLPHO RODRIGUEZ, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

Original Filed, Jun. 27, 1966, Clerk, U. S. Dist. Court

MEMORANDUM AND ORDER—June 27, 1966

Petitioner, a prisoner in custody under sentence of this Court, has filed a petition herein under the provisions of Title 28 U.S.C. § 2255, wherein he requests that his judgment of conviction be set aside "so that he would be restored to the status of one whom sentence has just been imposed, and who has ten (10) days in which to institute a direct appeal."

Oral notice of appeal was given at the time of sentencing, but petitioner's trial counsel failed to file a written notice of appeal, as provided by Federal Criminal Procedure Rule 37 (a). Petitioner alleges: "Thus, when trial counsel failed to file a written notice of appeal . . . with the knowledge that petitioner could not comply with Rule 37 (a) (1), he did with intent and knowledge deprive petitioner of his right to appeal by fraud."

The foregoing statement is petitioner's sole ground for relief. He does not assert that the failure to appeal resulted in the loss of a basic right, constitutional or otherwise, for which loss he is entitled to a remedy under § 2255. Petitioner has not, beyond the above conclusory statement, disclosed to this Court the nature of the error and prejudice which he proposes by appeal to correct. Consequently, there is no way in which this Court can determine the existence of prejudice or judge the substantiality of petitioner's claim.

Under these circumstances petitioner is not entitled to a hearing under § 2255. *Miller* v. *United States*, 339 F.2d 581 (9th Cir. Dec. 8, 1964); *Wilson* v. *United States*, 338 F.2d 54 (9th Cir. Oct. 23, 1964).

After a careful examination of the Court finds that petitioner's motion and the files and records of his case conclusively show that petitioner is entitled to no relief.

IT IS, THEREFORE, ORDERED that petitioner's application and motion for relief under Title 28 U.S.C. § 2255 be, and the same is hereby, denied.

DATED: June 27, 1966.

THOMAS J. MACBRIDE
United States District Judge

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21,410

ADOLPHO RODRIGUEZ, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

OPINION—December 5, 1967

On Appeal from the United States District Court
for the Eastern District of California

Before: JERTBERG and DUNIWAY, Circuit Judges, and WEIGEL, District Judge.

PER CURIAM:

Following a jury trial, appellant was convicted on all counts of an eleven count indictment charging violations of the Federal Narcotics Law, and on June 20, 1963, was sentenced to the custody of the Attorney General for a period of twenty years on each count, the sentences to run concurrently.

On October 31, 1963, appellant filed a motion in this court which, in substance, was a request to permit appellant to file an appeal from the district court judgment after the time set by Rule 37(a) Federal Rules of Criminal Procedure had expired, or, in the alternative, for a writ of habeas corpus. On November 18, 1963, this court denied the motion for lack of jurisdiction, citing *United States* v. *Robinson*, 361 U.S. 220 (1960), and refused to treat the issue as an application for a writ of habeas corpus.

On June 27, 1966, appellant filed a petition in the district court under the provisions of 28 U.S.C. § 2255, re-

questing the judgment of conviction be set aside "so that he would be restored to the status of one whose sentence has just been imposed and who has ten (10) days within which to institute a direct appeal." The petition was denied without a hearing.

Appellant filed a timely appeal and prosecutes his appeal *pro se* and *in forma pauperis*.

In denying the petition the district court stated:

> "Oral notice of appeal was given at the time of sentencing, but petitioner's trial counsel failed to file a written notice of appeal, as provided by Federal Criminal Procedure Rule 37(a). Petitioner alleges: 'Thus, when trial counsel failed to file a written notice of appeal . . . with the knowledge that petitioner could not comply with Rule 37(a)(1), he did with intent and knowledge deprive petitioner of his right to appeal by fraud.'
>
> "The foregoing statement is petitioner's sole ground for relief. He does not assert that the failure to appeal resulted in the loss of a basic right, constitutional or otherwise, for which loss he is entitled to a remedy under § 2255. Petitioner has not, beyond the above conclusory statement, disclosed to this Court the nature of the error and prejudice which he proposes by appeal to correct. Consequently, there is no way in which this Court can determine the existence of prejudice or judge the substantiality of petitioner's claim."

The order of the district court is affirmed on the authority of *McGarry* v. *Fogliani*, 370 F.2d 42 (9th Cir. 1966); *Miller* v. *United States*, 339 F.2d 581 (9th Cir. 1964); and *Wilson* v. *United States*, 338 F.2d 54 (9th Cir. 1964).

IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 21410

ADOLPHO RODRIGUEZ, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

JUDGMENT

APPEAL from the United States District Court for the Eastern District of California

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is Affirmed.

Filed and entered December 5, 1967

SUPREME COURT OF THE UNITED STATES

No. 227 Misc., October Term, 1968

ADOLPHO RODRIQUEZ, PETITIONER

v.

UNITED STATES

On petition for writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 749 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

November 18, 1968

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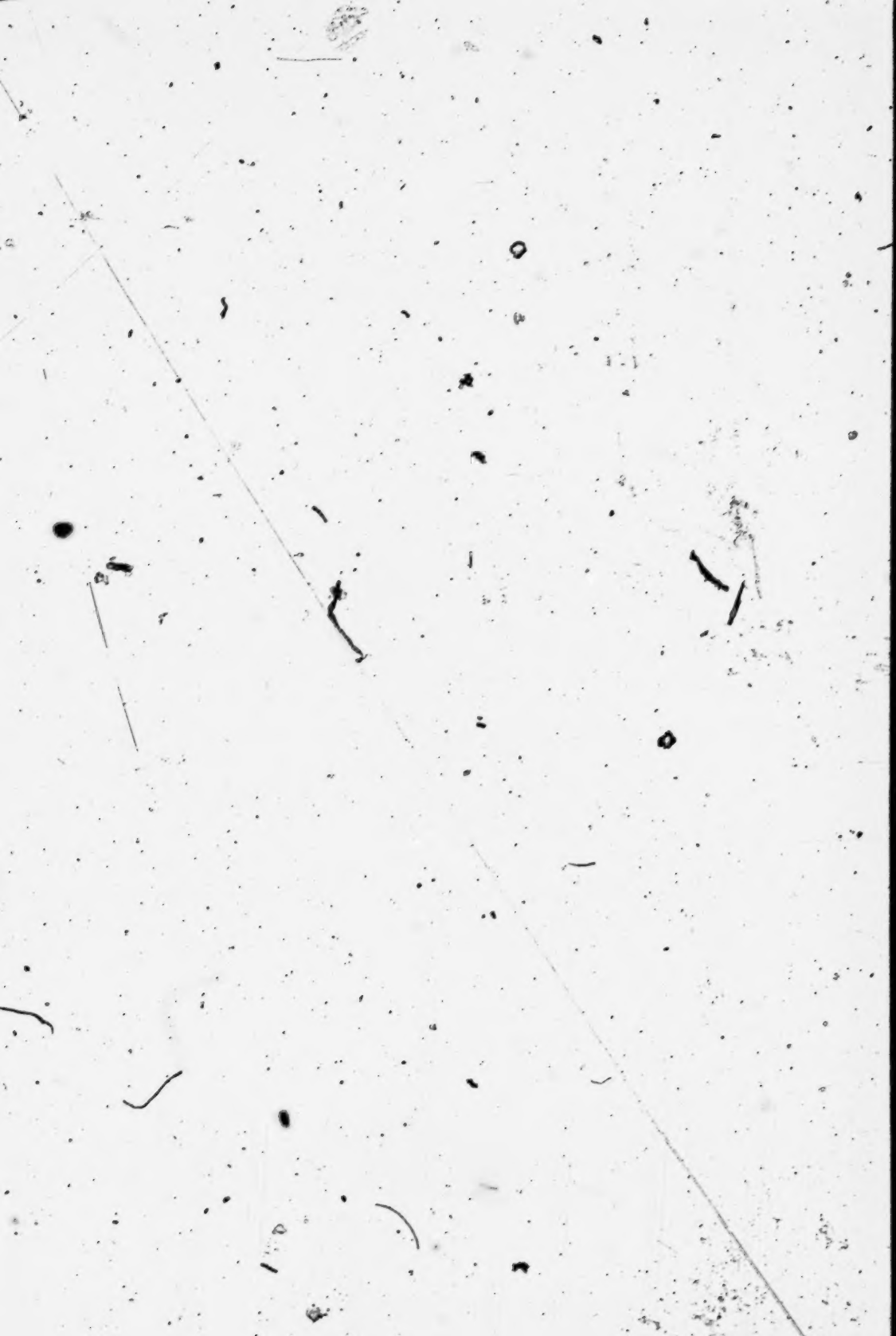

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 749

ADOLPHO RODRIQUEZ,

Petitioner,

vs.

UNITED STATES,

Respondent.

BRIEF FOR PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 749

ADOLPHO RODRIQUEZ,

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BRIEF FOR PETITIONER

Reports of the Opinions of the Courts Below

1. Unreported Memorandum and Order of the United States District Court for the Northern District of California, Northern Division (now the United States District Court for the Eastern District of California), dated June 27, 1966, in Civil No. 9670 (Appendix pp. 19-20).

2. *Per Curiam* Opinion of the United States Court of Appeals for the Ninth Circuit, dated December 5, 1967; reported in 387 Fed. (2d) 117 (C.A., 9th Cir., 1967) (Appendix pp. 21-22).

Jurisdiction of This Honorable Court

This matter comes before this Honorable Court on an Order granting a Writ of Certiorari dated November 18, 1968 (Appendix p. 24) to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming an

order of the U.S. District Court for the Eastern District of California made without hearing, denying the motion of Petitioner Rodriquez for relief pursuant to the provisions of 28 U.S.C. §2255.

Statutes and Rules Involved

1. 28 U.S.C. Section 2255:

"Section 2255. *Federal custody; remedies on motion attacking sentence.*

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

"A motion for such relief may be made at any time.

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial

or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

"An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

"An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

2. Rule 37—Rules of Criminal Procedure—Title 28 U.S.C.:

"Rule 37. *Taking Appeal; and Petition for Writ of Certiorari*

"(a) *Taking Appeal to a Court of Appeals.*

"(1) *Notice of Appeal.* An appeal permitted by law from a district court to a court of appeals is taken

by filing with the clerk of the district court a notice of appeal in duplicate. Petitions for allowance of appeal, citations and assignments of error in cases set forth the title of the case, the name and address of the appellant and of appellant's attorney, a general statement of the offense, a concise statement of the judgment or order, giving its date and any sentence imposed, and place of confinement if the defendant is in custody and a statement that the appellant appeals from the judgment or order. The notice of appeal shall be signed by the appellant or appellant's attorney, or by the clerk if the notice is prepared by the clerk as provided in paragraph (2) of this subdivision. The duplicate notice of appeal and a statement of the docket entries shall be forwarded immediately by the clerk of the district court to the clerk of the court of appeals. Notification of the filing of the notice of appeal shall be given by the clerk by mailing copies thereof to adverse parties, but his failure so to do does not affect the validity of the appeal.

"(2) *Time for Taking Appeal.* An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when

authorized by statute may be taken within 30 days after entry of the judgment or order appealed from."

The Question Presented for Review

The motion of Petitioner Rodriquez for relief under Section 28 U.S.C. #2255 (Appendix pp. 12-18) alleged that at the time of the sentencing of Petitioner, oral notice of appeal was given; that he instructed his attorney to appeal; that his attorney agreed to do so; and that as a result of the fraud and deceit of his attorney, unknown to appellant until some time after the expiration of the ten (10) days for filing a notice of appeal provided by Rule 37-A of the Rules of Criminal Procedure, the attorney failed to file the required notice.

The motion for relief did not set forth "the nature of the error and prejudice which he proposes by appeal to correct" or "that the failure to appeal resulted in the loss of a basic right, constitutional or otherwise, for which he is entitled to a remedy under §2255" (Appendix p. 19).

The United States District Court for the Northern District of California, Northern Division, without a hearing, denied the motion for relief upon the ground that appellant in his motion failed to set forth the basis upon which an appeal would be prosecuted (Memorandum and Order June 27, 1966, Appendix pp. 19-20).

The Court of Appeals for the Ninth Circuit in accordance with its decisions previously rendered, affirmed the order of the District Court upon the ground that appellant had failed in his motion to set forth contentions showing merit in an appeal. This decision was in conflict with decisions

of the Courts of Appeal for the First, Fifth, Sixth, Seventh, Eighth, Tenth and District of Columbia Circuits.

The issue presented to this Court is whether or not upon the basis of an allegation that he was deprived of his right to appeal as a result of the fraud and deceit of his attorney, the Petitioner is entitled to and should be granted a hearing on his motion for relief under 28 U.S.C. #2255 without having set forth in his motion the grounds upon which he proposed to appeal if his right to appeal were restored.

A Concise Statement of the Case

The Petitioner was convicted by a jury on eleven counts of violations of the narcotics laws, and on June 20, 1963, was sentenced by the District Court for a period of 20 years on each count. A motion for a new trial was made by the Petitioner's retained counsel and denied. The Petitioner, who is of Mexican descent and whose knowledge of the English language was limited, stated that he requested the official court interpreter to advise the Court of his desire to appeal and also asked his counsel to tell the trial court that he wanted to appeal. He states that his counsel gave oral notice of appeal, and that the trial court told him that he would have to file a written notice. The Petitioner was then taken in custody by the marshal, being first placed in the county jail and then being transferred to the Federal prison at McNeill's Island, Washington. Petitioner states that before he was taken to the county jail his counsel advised both him and his wife that he would arrange for their appeals. The Petitioner neither saw nor heard from his counsel thereafter.

On August 7, 1963, Petitioner filed a written Notice of Appeal in the District Court in which he stated that he had theretofore given oral notice of appeal and that the document then filed was a formal notice of appeal. As points raised on appeal, the Petitioner referred to the Fourth, Fourteenth and Fifth Amendments, to Section 3109 of Title 18 of U.S.C.A. and stated that there was insufficient evidence at the trial to convict the defendants (Appendix pp. 2-3).

Without a hearing and on August 22, 1963, the District Judge filed a Memorandum and Order holding that Rule 37(a) of the Federal Rules of Criminal Procedure required that written notice of appeal be filed within ten days after the entry of judgment; that compliance with that requirement was jurisdictional; and denied leave to appeal *in forma pauperis* as futile (Appendix pp. 4-5).

On October 24, 1963, the Petitioner filed a motion in the Court of Appeals for leave to proceed *in forma pauperis* and requested the Court of Appeals to set aside the default and permit the Petitioner to perfect and present an appeal before that Court (Appendix pp. 5-10). Without a hearing the Court of Appeals on November 18, 1963 affirmed the District Judge and refused to treat the petition as an application for habeas corpus (Appendix p. 11).

On February 15, 1966, Petitioner filed a motion pursuant to Section 2255, Title 28 of the U.S. Code asking that judgment of conviction be set aside and that he be restored to the status of one on whom sentence had just been imposed and therefore had ten days in which to institute a direct appeal (Appendix pp. 12-18). Here the ground was that oral notice of appeal was given and that he was de-

frauded of his right to appeal by the failure of his counsel to file the necessary document. Again no hearing was held and on June 27, 1966, the District Judge denied the motion. In its "Memorandum and Order" the District Court referred to the Ninth Circuit cases holding that an applicant for relief under Section 2255 must "disclose the nature of the error and prejudice which he proposes by appeal to correct" (Appendix pp. 19-20).

On December 5, 1967, the Court of Appeals for the Ninth Circuit affirmed the District Court's Memorandum and Order in a *per curiam* decision (387 Fed. (2d) 117, Appendix pp. 21-22). The petition for a Writ of Certiorari to the Supreme Court of the United States followed on May 6, 1968.

It is clear that from the moment the Petitioner was removed from the Court House after being sentenced on June 20, 1963, he has been without the benefit of counsel. Petitioner believed that he was represented by counsel during the critical ten-day period in which a written notice of appeal should have been filed.

Even if retained counsel felt that his duty to the Petitioner terminated with the conclusion of the trial, there was a clear duty to file the notice of appeal as requested by his client, or at the very least to advise the Court and Clerk that he no longer represented the Petitioner, so that the Clerk could "prepare and file forthwith a notice of appeal on behalf of the defendant" as is provided in Rule 37(a)(2).

It is worthy of note that a written Notice of Appeal need contain no reference to the grounds for or basis of the appeal.

The Petition for Writ of Certiorari and the Memorandum for the United States in opposition to the granting of the Petition for a Writ of Certiorari both indicate a conflict in decisions between the Ninth Circuit and the different rule obtaining in the First, Fifth, Sixth, Seventh, Eighth, Tenth and District of Columbia Circuits. Basically the difference is that the Courts in the First, Fifth, Sixth, Seventh, Eighth, Tenth and District of Columbia Circuits hold that the defendant in a criminal case is entitled to a hearing in a Federal District Court upon his contention that his trial counsel failed to appeal from a judgment of conviction because of fraud or deceit without, as in the Ninth Circuit, also alleging valid grounds for or stating the basis of an appeal.

Summary of Argument

The rule in the Ninth Circuit is that a petitioner for relief under Section 2255 must first show the deprivation of a constitutional right and then, in addition, must show an error or prejudice which might have been corrected on appeal.

The Petitioner here claims that he was deprived of his right to appeal by reason of the fraud of his counsel. The courts of most circuits other than the Ninth have held that a petitioner making such a claim is entitled to a hearing, and that if his claim is supported at the hearing, his right of appeal must be restored.

We submit herein on behalf of Petitioner that the rule in those circuits is the proper and reasonable rule, and that the added requirement of the Ninth Circuit is wholly unreasonable and deprives the Petitioner of his constitutional rights.

Argument

The question at issue before this Honorable Court is a very narrow one. A prisoner of Mexican descent, whose knowledge of the English language necessitated the presence of an interpreter at his trial, was convicted and sentenced. He requested the interpreter to advise the Court and his counsel of his desire to appeal. The Petitioner was then removed to prison and never again saw nor heard from his trial counsel, who failed to file the written notice necessary under Rule 37(a)(2):

> "Petitioner, a Federal prisoner, failed to file a timely notice of appeal from his conviction although an oral notice of appeal was noted by his attorney at the time of his sentencing" (Decision of Court of Appeals, November 18, 1963, Appendix p. 11).
>
> "Oral notice of appeal was given at the time of sentencing, but Petitioner's trial counsel failed to file a written notice of appeal * * * " (Memorandum and Order of District Court dated June 27, 1966, Appendix p. 19).

The fact that an oral notice of appeal was given has been judicially determined. The record also makes it clear that the Petitioner believed that his counsel would file the necessary written notice.

When these facts are brought to the attention of the trial court, is not the Petitioner entitled to a hearing to determine whether the failure to file the written notice of appeal was the result of fraud of counsel or was the result of Petitioner's considered decision not to appeal?

Since *Coppedge* v. *United States*, 369 U.S. 438, 8 L. Ed. (2d) 21, 82 S. Ct. 917 (1962) an appeal in a criminal case has been a matter of right. If a court imposes sentence on a "defendant not represented by counsel, defendant shall be advised of his right to appeal and if he so requests, the Clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant" (Rule 37(a)(2)).

> "We think that the positive mandate contained in Rule 37(a)(2) that '[w]hen a court after trial imposes sentence upon a defendant not represented by counsel, the defendant *shall be advised of his right to appeal,*' coupled with Rule 44 of the Rules, '[i]f the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him *at every stage of the proceeding* unless he elects to proceed without counsel or is able to obtain counsel,' compels the conclusion that Congress sought to protect against the very deprivation of a constitutional right that is threatened, whether through inadvertence, or lack of understanding of counsel of his full obligation under the appointment of the court."
>
> " • • • We think also that it is not an unwarranted construction of the language of Rule 37(a)(2) to construe the words 'defendant not represented by counsel' to mean a 'defendant not represented by counsel during the ten day period' after which his failure to file a notice of appeal would forever bar such right. • • • "
>
> *Boruff* v. *U.S.*, 310 Fed. (2d) 918, at 921 (C.A., 5th Cir., 1962).

The written notice of appeal need not state either grounds or the basis of the appeal. The filing of the written notice

of appeal is a simple ministerial act, performed by counsel if the defendant is represented, or by the Clerk if the defendant is without counsel. A notice of appeal merely preserves a right and of itself does nothing more. Its only purpose is to give the Clerk of the Court, the court reporter, and the prosecutor notice that the defendant desires a review of his trial. It starts the time running within which the appeal must be perfected by the preparation of the reporter's transcript, the filing of briefs and setting the case for argument. If a Petitioner can establish that he was deprived of his right to appeal by the failure of retained counsel to file a simple written notice with the Clerk when his client had requested him to do so, why should a Petitioner have to show more? Assuming that he proves that he was deprived of the right why should he not be placed in the position that he would have been in if his simple instructions had been carried out?

Such is the rule in other circuits. In the Ninth Circuit, however, the Court has held that in addition to showing that he has been defrauded of his right to appeal, the Petitioner must show "the loss of a basic right, constitutional or otherwise" or "the error and prejudice which he proposes by appeal to correct" (Memorandum and Order, Appendix p. 19).

In *Dodd* v. *U.S.*, 321 Fed. (2d) 240 (C.A., 9th Cir., 1963) the Court of Appeals for the Ninth Circuit stated:

> "There is logic to support a proposition that a failure of counsel to file notice of appeal will only justify relief under Section 2255, where there is also a showing of 'plain reversible error in the trial', Mitchell v. United States (supra), United States v. Peabody (supra) and Glouser v. United States (supra) (p. 245)."

Of the three cases cited in support, it is to be noted that *Mitchell* v. *U.S.*, 254 Fed. (2d) 954 (C.A., D.C. Cir., 1958) has been disapproved or overruled *sub silentio* in the District of Columbia Circuit by *Dillane* v. *U.S.*, 350 Fed. (2d) 732 (C.A., D.C. Cir., 1965); *U.S.* v. *Peabody*, 173 Fed. Supp. 413 (D.C., W.D. Wash., 1958) is a decision of a District Court within the Ninth Circuit; and in *Glouser* v. *U.S.*, 296 Fed. (2d) 853 (C.A., 8th Cir., 1961) the Court held that the record was clear that appellant did not expect or believe that his attorney would take an appeal.

In the Memorandum for the United States in Opposition to the Granting of the Petition for a Writ of Certiorari, the Solicitor General stated at page 3 that while the Fifth, Seventh and District of Columbia Circuits support the rule that a failure of counsel to file a notice of appeal when requested to do so by his client is basis for relief under Section 2255 the better rule is that such a charge be accompanied by "some indication of the nature of the errors which allegedly occurred at trial". The Solicitor General cites *Desmond* v. *U.S.*, 333 Fed. (2d) 378 (C.A., 1st Cir., 1964) and *Hannigan* v. *U.S.*, 341 Fed. (2d) 587 (C.A., 10th Cir., 1965) as supporting the rule of the Ninth Circuit. An examination of these cases reveals an exactly contrary holding.

In *Desmond* v. *U.S.*, the Court of Appeals for the First Circuit held that the appellant "to obtain relief does not need to show 'plain reversible error in his trial' but that the shoe is on the other foot and that to defeat relief the Government must show that appellate relief would be futile" (p. 381).

In *Hannigan* v. *U.S.*, the Court of Appeals for the Tenth Circuit held (p. 588):

"At the time of imposition of sentence, the appellant was undoubtedly entitled to advice of counsel or the court concerning his unquestionable right to appeal. If counsel was discharged upon imposition of sentence without having advised his client of his right to appeal, and having protected him in the exercise of that right, it became the duty of the court under Rule 37(a)(2) to so advise the defendant and, if requested, cause the Clerk to 'prepare and file forthwith a notice of appeal on behalf of the defendant.'

"The time for filing an appeal under Section 37(a)(2) does not commence to run until the defendant has been advised of his right to appeal and the effective assistance of counsel has been afforded. See Boruff v. United States, 5 Cir., 310 F. 2d 918. Moreover, a convicted and confined person who has not been afforded the assistance of counsel concerning his right to appeal and the exercise thereof may collaterally attack his judgment of sentence under Rule 2255 for 'plain error' in the trial of the case. See Fennell v. United States (10 C.A.), 339 F. 2d 920."

How the Solicitor General could suggest that either *Desmond* or *Hannigan* were in accord with *Dodd's* "plain reversible error" requirement or the necessity for a disclosure of "the nature of the error and prejudice which he proposes by appeal to correct" demanded by the District Court and the Court of Appeals for the Ninth Circuit in the case at bar, is difficult to understand, though the Solicitor General only suggests that the two cases indicate that an application under Section 2255 should contain "some indication as to the nature of the errors which allegedly occurred at the trial".

The fact is that the Ninth Circuit stands alone. The First, Fifth, Sixth, Seventh, Eighth, Tenth and District of Columbia Circuits all agree that the right to appeal can only be lost as a result of the "considered choice" of the prisoner. Without multiplying authorities, we would cite the following:

First Circuit:

Desmond v. *U.S., supra.*

Fifth Circuit:

Boruff v. *U.S., supra;*
Camp v. *U.S.*, 352 Fed. (2d) 800 (C.A., 5th Cir., 1965).

Sixth Circuit:

U.S. v. *Smith*, 387 Fed. (2d) 268 (C.A., 6th Cir., 1967).

Seventh Circuit:

Calland v. *U.S.*, 323 Fed. (2d) 405 (C.A., 7th Cir., 1963).

Eighth Circuit:

Williams v. *U.S.*, 402 Fed. (2d) 548 (C.A., 8th Cir., 1968).

Tenth Circuit:

Hannigan v. *U.S., supra.*

District of Columbia Circuit:

Dillane v. *U.S., supra.*

The Solicitor General in the Memorandum of the United States in Opposition to the Granting of the Petition for Writ of Certiorari answered the Petitioner's claim that the rule in effect in the Ninth Circuit placed an impossible burden upon the Petitioner (Petition for Writ of Certiorari, p. 9) by stating that the requirement "would merely require a statement in layman's language, as to the nature of the errors at trial".

The Petitioner is of Mexican descent and his knowledge of the English language is limited. He was one of five defendants who were convicted after a trial lasting some five weeks and in which one person was found not guilty. Except for Petitioner's wife, the other defendants were each represented by separate counsel. How, without the assistance of counsel and without a reporter's transcript, a person such as the Petitioner could possibly prepare a statement as to the nature of the errors at the trial or show a plain reversible error at the trial is beyond comprehension. Certainly no layman with a limited knowledge of English could be expected to recognize and recall the errors of law affecting him as they occurred in an extended trial, particularly when other defendants represented by different lawyers were being tried at the same time.

The testimony necessary to establish why after giving oral notice of appeal, counsel failed to file the written notice of appeal should be simple to obtain. The testimony of the Petitioner and of his former lawyer would seem to be enough. Once it is established that the Petitioner did not intentionally relinquish his right of appeal the hearing should come to an end and the right of appeal should be restored.

The grounds for relief under Section 2255 are those which permit a collateral attack upon the sentence. Generally speaking a collateral attack must allege the loss or denial of a constitutional right. "Habeas Corpus will not be allowed to do service for an appeal." (*Sunal* v. *Large*, 332 U.S. 174, 91 L. Ed. 1982, 67 S. Ct. 1588 (1947).)

The right to appeal from a sentence following conviction of a crime is a matter of right. (*Coppedge* v. *U.S., supra.*) On appeal the appellant may assert any ground he believes will be effective. Most of the arguments on appeal do not approach the level of the denial of a constitutional right.

Therein lies the error of the rule of the Ninth Circuit for it conditions the exercise of the constitutional rights of a prisoner under Section 2255 by insisting that those rights may only be exercised if, in the opinion of the trial court, the prisoner also has valid grounds for a direct appeal. Perhaps the courts of the Ninth Circuit do not insist upon a finding of "a plain reversible error at the trial" (*Dodd* v. *U.S., supra,* at p. 245), but certainly these courts insist that a prisoner must show that he "suffered prejudice in not securing a review by appeal". (*Dodd* v. *U.S., supra,* at p. 246.)

It is a proper function of a trial court to find the facts in connection with a claim for relief under Section 2255 and to ascertain the basis for the claimed right to relief under that statute. It is not a proper function for a trial court to hold a hearing in an endeavor to discover whether the trial record contained a "plain reversible error" or whether a prisoner deprived of his right of appeal by fraud of counsel "suffered prejudice in not securing a review by appeal".

These are properly the functions of an appellate court aided by the transcript of the record at the trial, the briefs of counsel and oral argument.

The rule in the Ninth Circuit compels the trial court to sit in judgment on its own prior decision.

Does the extent of the hearing depend upon whether the trial court feels bound by the "logic" of the "plain reversible error" rule of *Dodd* or only by the necessity to find the "error and prejudice which he (the prisoner) proposes by appeal to correct" as stated by the District Judge? (Appendix p. 19.) What is meant by "judging the substantiality of Petitioner's claim"? (Appendix p. 19.)

It would seem that once the trial court departs from the constitutional issues presented by a Section 2255 petition and proceeds to questions relating to success or failure on appeal the court can only be safe if it conducts a full scale review of the entire record of the case.

Whatever the trial court decides is subject to appeal so anything less than a complete review of the whole case would only grant one more ground for reversal on appeal.

The trial court is asked, in effect, to pre-try the prisoner's appeal. The prisoner is given the right to have his appeal heard twice, once by the trial court and then by the Court of Appeals.

The procedure outlined in *Dodd* was designed to minimize successive applications under Section 2255. Many of the cases arose after the Petitioner had exercised his rights of appeal and post-conviction procedures either in state or Federal courts. The Petitioner here asks only one remedy —that he be restored to his constitutional right of appeal

taken from him by fraud of counsel. There is no need to apply rules designed to prevent successive applications for relief under Section 2255.

The Petitioner at Bar asks only that his right to appeal be restored. If he was defrauded of that right by an officer of the court he should have it restored. Whatever grounds the Petitioner may have for appealing his conviction and sentence should be set forth in his subsequent appeal before the Court of Appeals.

Conclusion

The case should be reversed and remanded to the District Court with instructions to appoint counsel for the Petitioner, advise the United States Attorney, and hold a hearing to ascertain if the failure to file the written notice of appeal was or was not the result of the considered choice of the Petitioner. If the Court finds that the Petitioner desired to appeal, then the sentence should be vacated and Petitioner should be re-sentenced, so that his right to appeal is restored.

Dated: San Francisco, California, January 23, 1969.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 749

ADOLPHO RODRIQUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (App. 21–22) is reported at 387 F. 2d 117. The memorandum order of the district court (App. 19–20) is not reported.

JURISDICTION

The judgment of the court of appeals (App. 23) was entered on December 5, 1967. The petition for a writ of certiorari was granted on November 18, 1968 (App. 24). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's motion to vacate sentence, alleging that retained counsel wrongfully failed to perfect an appeal, was properly denied without a hearing.

STATEMENT

After a jury trial in the United States District Court for the Northern District of California (now the Eastern District) in which he was represented by retained counsel, petitioner was convicted on eleven counts of an indictment charging concealment and sale of heroin in violation of 21 U.S.C. 174. On June 20, 1963, he was sentenced to imprisonment for twenty years on each count, the terms to run concurrently.

On or about August 7, 1963, petitioner filed with the district court a notice of appeal (App. 2) and an application to proceed in forma pauperis. In the former document, petitioner alleged that he had given oral notice of appeal, and that the document constituted a "formal notice of appeal" (App. 2–3). On August 22, 1963, the district court, accepting petitioner's allegations as true, denied the application on the ground that no written notice of appeal had been filed within ten days of judgment as required by Rule 37(a)(1),[1] F. R. Crim. P. (App. 4–5). On October 31, 1963, petitioner applied to the court of appeals for an extension of time within which to apply for leave to appeal in forma pauperis or, alternatively, for a writ of habeas corpus (App. 7–10). In that applica-

[1] Now Rule 4(b), Federal Rules of Appellate Procedure.

tion, petitioner alleged, *inter alia*, that prior to sentencing he had informed his retained counsel that he desired to appeal; that oral notice of appeal had been given to the trial court at the time of sentencing; and that, without his knowledge, his attorney had terminated his representation upon conclusion of the proceedings in the trial court and had not filed a written notice of appeal as requested (App. 8–10). On the authority of *United States* v, *Robinson*, 361 U.S. 220, the court of appeals denied the application for an extension of the time in which to file a notice of appeal; and it also denied the application for a writ of habeas corpus (App. 11).

On February 15, 1966, petitioner moved to vacate his sentence under the provisions of 28 U.S.C. 2255. In that motion petitioner alleged as the sole ground for relief that "I was 'defrauded' of my 'known right' to appeal by retained trial counsel, Paul J. Melee" (App. 14). In support of that allegation, petitioner set forth the following (App. 15):

> In the case at bar, the record will reflect that petitioner gave oral notice of appeal. Thereafter, petitioner's retained trial counsel failed to file a written notice of appeal in compliance with Rule 37(a)(1), Federal Rules of Criminal Procedure, thereby "defrauding" petitioner of his "known right" to appeal. *Calland* v. *United States*, 323 F. 2d 405.
>
> It is to be observed that petitioner is of mexican decent [sic], a citizen of the United States of America, who could not communicate in the English language (read, write or speak) at the

time judgment was imposed. Petitioner was also incarcerated, without funds or the technical knowledge with which to exercise his "known right" of appeal. Thus, when trial counsel failed to file a written notice of appeal, after oral notice had been given, with the knowledge that petitioner could not comply with Rule 37(a)(1), he did with intent and knowledge deprive petitioner of his right to appeal by fraud.

Petitioner was transported to the United States Penitentiary, where he is presently confined, to commence service of his sentence, with the sincere belief that his judgment of conviction was, in fact, on appeal.

Petitioner has diligently studied the English language during these past two years of incarceration, in order that he may effectively seek judicial redress in this matter.

In denying the motion, the district court held, *inter alia* (App. 19):

> Oral notice of appeal was given at the time of sentencing, but petitioner's trial counsel failed to file a written notice of appeal, as provided by Federal Criminal Procedure Rule 37(a). Petitioner alleges: "Thus, when trial counsel failed to file a written notice of appeal . . . . with the knowledge that petitioner could not comply with Rule 37(a)(1), he did with intent and knowledge deprive petitioner of his right to appeal by fraud."
>
> The foregoing statement is petitioner's sole ground for relief. He does not assert that the failure to appeal resulted in the loss of a basic right, constitutional or otherwise, for which loss

> he is entitled to a remedy under § 2255. Petitioner has not, beyond the above conclusory statement, disclosed to this Court the nature of the error and prejudice which he proposes by appeal to correct. Consequently, there is no way in which this Court can determine the existence of prejudice or *judge the substantiality* of petitioner's claim. [Emphasis added.]

The court below affirmed on the same grounds (App. 21–22).

SUMMARY OF ARGUMENT

In the instant motion to vacate his sentence, petitioner alleged only two facts: that an oral notice of appeal had been given at trial, and that his retained counsel had failed to file a written notice of appeal. Because these allegations are as consistent with an innocent explanation as they are with petitioner's conclusory assertion that his attorney thereby "defrauded" him of his right to appeal, the motion was properly denied without a hearing—particularly in light of the fact that petitioner's motion also failed to specify any arguable error at trial. The additional factual allegations contained in the petition for a writ of certiorari do not indicate that the courts below erred on the record before them, but merely demonstrate that petitioner may, if he desires, file a new motion, under oath, in the district court alleging facts sufficient to require further proceedings.

This Court need not specify that a hearing would invariably be required even when such a motion adequately alleges that the prisoner was defrauded of his

right to appeal because of counsel's professional misconduct. In some cases, the district court may seek a response from the attorney or other officers, and may properly deny the motion on the basis of the attorney's affidavit offering a convincing reason for his action, or on the basis of a showing by documentary evidence that the allegations are untrue.

ARGUMENT

The basic question in this case is how much of a showing must be made to require a hearing by the district court on a prisoner's claim that his own counsel—in this case, retained—wrongfully deprived him of his right to appeal. Petitioner, at the district court level, alleged only two facts: that an oral notice of appeal had been given at trial, and that counsel failed to file a written notice of appeal. On the basis of these two facts, petitioner argued that he was "defrauded" of his known right of appeal. The facts alleged, however, do not add up to the conclusion suggested by petitioner—*i.e.*, fraud on the part of retained counsel. There might well have been other reasons for the failure, including petitioner's own later decision not to appeal.

In the petition for a writ of certiorari filed in this Court, petitioner gave a different, much more detailed, version of events. He there alleged that he requested an interpreter to advise the court that he wanted to appeal; that he instructed his attorney to appeal; that he never saw or heard from his attorney after the date of sentencing; and that on that

day his attorney promised petitioner and his co-defendant wife that he would arrange for their appeals so that petitioner, when he left for the penitentiary, believed that the attorney was making the necessary arrangements for appeal (Pet. 4–5). None of these allegations was, however, before the district court on the motion to vacate. None of them is supported by an oath so that, if the allegation is proven deliberately false, petitioner would be subject to the penalties for perjury.[2] Thus petitioner is asking this Court to reverse the courts below on the basis of a very different record from that which was before the district court (see Pet. Br. 8, 10).

This case illustrates the practical problems which confront district courts in dealing with prisoners' motion under 28 U.S.C. 2255. Except for the question of whether it is necessary to show some basis on which an appeal would lie (see *infra*, pp. 10–11), there is substantial agreement in the decisions as to when a prisoner can be said to have been deprived of his right to appeal so that, when the issue is raised at a later date, a prisoner can be given what is in effect a late appeal.[3] Such relief is granted in two

[2] Rule 28(1) of the Rules of Practice, United States District Court, Northern District of California, specifically provides that a motion to vacate must be verified by the movant prior to filing.

[3] There is some variation in the method of accomplishing this result. In the Fifth Circuit, if a prisoner establishes that he had been defrauded of his right to appeal, he is entitled to use the Section 2255 remedy for direct review in both the district court and the court of appeals. *[illegible] v. United States*, 346 F. 2d 789, 792 (C.A. 5); *Camp* v. *U[illegible]tates*, 352 F. 2d 800 (C.A. 5).

general types of situations: (1) where counsel abandoned his client's cause and failed to advise him of his right to take an appeal and the steps necessary to perfect that right, *Williams* v. *United States*, 402 F. 2d 548 (C.A. 8); *Dillane* v. *United States*, 350 F. 2d 732 (C.A.D.C.); see *Boruff* v. *United States*, 310 F. 2d 918 (C.A. 5); *United States* v. *Smith*, 387 F. 2d 268 (C.A. 6); *Hannigan* v. *United States*, 341 F. 2d 587 (C.A. 10);[4] or (2) where counsel *fraudulently* failed to perfect an appeal on the defendant's behalf, *Desmond* v. *United States*, 333 F. 2d 378 (C.A. 1); *Camp* v. *United States*, 352 F. 2d 800 (C.A. 5); see *Calland* v. *United States*, 323 F. 2d 405 (C.A. 7). On the other hand, it is well established that the need for an orderly administration of criminal justice precludes a later appeal where a timely notice of appeal had not been filed because of mere *neglect* on the part of counsel. *United States* v. *Robinson*, 361 U.S. 220; *Bern[illegible]* v. *United States*, 378 U.S. 530. And, as suggested by petitioner, a knowing

In the Eighth and District of Columbia Circuits, upon a proper showing, judgment will be vacated and the prisoner will be resentenced and allowed ten days in which to file a written notice of appeal. *Williams* v. *United States*, 402 F. 2d 548, 552 (C.A. 8); *Dillane* v. *United States*, 350 F. 2d 732 (C.A.D.C.).

[4] The situation where a defendant in a federal court has not been advised of his right to appeal should arise very rarely in the future. Under Rule 32(a)(2), F.R. Crim. P., the trial court, at the time of sentencing, is required to advise each defendant of his right to appeal, and of his right to proceed in forma pauperis if he is unable to pay the costs. If the defendant so requests, Rule 32(a)(2) requires the clerk of the court to prepare and file a timely notice of appeal on the defendant's behalf.

decision by a defendant not to take an appeal precludes a change of heart at a later date. The difficulty is not in the principles to be applied, but in the manner of applying them to the various petitions filed by prisoners, sometimes long after the events in question.

Petitioner's counsel suggests (Br. 16) that the issue, such as petitioner raises, can easily be resolved by a hearing at which petitioner and his former counsel would testify. This is a deceptively simple solution. To use it, the defendant must be brought before the district court from Washington, accompanied by guards since he is a prisoner with a long sentence. Moreover, a respected member of the bar must, in effect, face a public hearing on a charge that he has been guilty of fraud and deceit in the discharge of his duties—conduct which could subject the attorney to subsequent suspension or disbarment. See, *e.g.*, *People* v. *Brown*, 39 Ill. 2d 307, 235 N.E. 2d 562. The time of an already overburdened court must be taken up with a hearing on allegations which, in many cases, turn out to be wholly contrived.[5] For these reasons, a hearing should not be required on the basis of unspecific and inconclusive allegations such as this petitioner

[5] In 1961, only 3 percent of all Section 2255 applications were granted by district courts. *Machibroda* v. *United States*, 368 U.S. 487, 497, n. 2 (dissenting opinion). The number of such applications filed each year has approximately doubled since then, while the number of all requests for collateral relief has climbed to a record high of 10,989. Administrative Office of the United States Courts, Annual Report of the Director, 1968, pp. II–43—II–44.

made in the district court. Some consideration is due the attorney and the court, as well as the prisoner.

The necessity to confine hearings to cases which potentially can bear some meaningful results has, we believe, led the court below to adopt the rule of decision applied in this case. That rule is that a defendant who claims that counsel has deprived him of his right of appeal must specify the alleged error at trial. *Miller* v. *United States*, 339 F. 2d 581 (C.A. 9); *Wilson* v. *United States*, 338 F. 2d 54 (C.A. 9).* The reason underlying this requirement is apparently the following. Even if a defendant could prove that he was deprived of his right to appeal, he would not be entitled to have his sentence vacated. The relief to which he would be entitled would be to have his case considered as if on direct appeal. See n. 3, *supra*. Accordingly, if there is no issue which would arguably result in vacation of the judgment on direct appeal, there is no reason to go into the question of whether an appeal should have been noted. Moreover, a showing of arguable error would tend to bolster a claim that counsel had been derelict in failing to take an appeal.

We recognize, however, that such a requirement does present a danger that a motion under 28 U.S.C. 2255 will not always reach the situation in which a collateral remedy is most appropriate—the rare situation of an ignorant defendant who has been caught in the coils of judicial machinery gone awry. The

* The court of appeals also cited *McGarry* v. *Fogliani*, 370 F. 2d 42 (C.A. 9), which follows *Wilson* and *Miller*.

more inarticulate and ignorant the defendant, the less likely it is that he would be able to describe, or even to ascertain the existence of, any error at his trial. In most cases it is probable, as we suggested in opposing the petition for certiorari in this case, that prisoners could, in layman's language, make some statement of the nature of the claimed error. We do not urge, however, that this be an absolute prerequisite to a district court's determination that some investigation should be made of a defendant's claim that he has been fraudulently deprived of his right to appeal.[7]

[7] Several courts of appeals have held that where the defendant claims that he was not advised of his right to appeal, or where the defendant claims that counsel deliberately and fraudulently failed to perfect an appeal, the defendant is entitled to a hearing under the provisions of 28 U.S.C. 2255, notwithstanding the fact that the motion papers fail to allege the nature of the error which occurred at trial. See *Camp* v. *United States*, 352 F. 2d 800 (C.A. 5); *Calland* v. *United States*, 323 F. 2d 405 (C.A. 7); *Dillane* v. *United States*, 350 F. 2d 732 (C.A.D.C.).

On the other hand, the courts of appeals for the First and Tenth Circuits, as well as the court below, have ruled that there must be some indication as to the nature of the errors which allegedly occurred at trial prior to a hearing on the motion under the provisions of 28 U.S.C. 2255. In *Desmond* v. *United States*, 333 F. 2d 378, 381 (C.A. 1), the court analogized the situation to one where a defendant applies for leave to appeal in forma pauperis under the provisions of 28 U.S.C. 1915. In holding that the government should be permitted to point out the futility or frivolity of an appeal—as it would be able to do in opposition to a motion for leave to appeal in forma pauperis—before a hearing on the motion should be granted, the court implicitly required some assertion of the nature of the alleged errors at trial, since the government would not otherwise be able to make a responsive claim of futility

What we do urge is that, particularly where he has failed to make any showing of an arguable point on appeal, a defendant who, like this petitioner, claims that he was fraudulently deprived of his right to appeal, should be held to the duty to make specific and detailed allegations of the facts giving rise to that complaint. He should not be allowed to rest on a generalized charge of fraud supported, as was petitioner's application to the district court, only by factual allegations which are as consistent with an innocent explanation as with fraud. This is a general requirement with respect to motions under 28 U.S.C. 2255. See, *e.g.*, *Martinez* v. *United States*, 344 F. 2d 325 (C.A. 10); *United States* v. *Orlando*, 327 F. 2d 185, 188–189 (C.A. 6); *Rivera* v. *United States*, 318 F. 2d 606, 608 (C.A. 9); *Davis* v. *United States*, 311 F. 2d 495 (C.A. 7). It would seem to be especially applicable where a defendant is accusing his own counsel of breach of professional duty. Adherence to such a requirement would aid in narrowing and framing the disputed factual issues to determine whether they ought to be resolved at a subsequent hearing. It would also be a safeguard against abuse since, if the movant must allege specific facts, he may be aware that his specific allegations may be shown to be deliberately false and that he himself may be subject to prosecution for perjury. The kind of allegations to which this

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or frivolity. And in the Tenth Circuit the court has said that an allegation that counsel failed to advise his client of his right to appeal is not enough, that there must be an additional allegation of "plain error" at trial. *Hannigan* v. *United States*, 341 F. 2d 587, 588 (C.A. 10).

argument is directed can be made by any prisoner who has a just complaint. He knows whether he did or did not arrange (or seemingly arrange) with an attorney to take an appeal and whether the attorney did or did not tell him (or seemingly tell him) that he would do so. This very case illustrates our contention in this respect. In this Court, in his petition for a writ of certiorari before counsel was appointed, petitioner did make the kind of specific allegations which, if made to the district court, would require further inquiry by the court. He did not make them under oath to the district court. His allegations there were too generalized and inconclusive to require further action. His allegations in this Court, if made under oath, would in our view require some further consideration of his claim.

It might be enough to rest the matter there and suggest that, if petitioner is willing to make his present allegations under oath, the district court should hold a hearing on his claim. Considering the growing problem which motions under 28 U.S.C. 2255 present, however, we do not so suggest. Since the issue is before the Court at this time, we believe that it is appropriate to consider whether, when such a motion does allege facts sufficient to require further consideration, the district court must invariably order a hearing, or whether any alternative procedures are open to it. At least in the situation which this case presents, where a convicted prisoner claims that his own attorney has been guilty of a breach of professional

duty, we believe that it would be appropriate for a district court to consider an affidavit by the attorney involved before deciding whether a hearing is needed. The attorney may have a very simple explanation of the facts which the defendant alleges; he may have documentary evidence which refutes the allegations made. This Court in *Machibroda* v. *United States*, 368 U.S. 487, 495, noted that the language of 28 U.S.C. 2255 "does not strip the district courts of all discretion to exercise their common sense." It seems to us "common sense" to allow an attorney the courtesy of refuting a prisoner's charges against him by affidavit before requiring the attorney to go through a hearing in which he is in effect the accused. If his affidavit is convincing as to the reasons for his action, or if the attorney can show by documentary evidence that the allegations are untrue, the district court may properly conclude that there is no need for a hearing. If the affidavit leaves the issue in doubt, the court may appoint an attorney for the prisoner, and have the former attorney testify subject to cross-examination without the necessity of producing the prisoner. *Sanders* v. *United States*, 373 U.S. 1, 20–21; *Machibroda*, *supra*, 368 U.S. at 495–496. On the other hand, there may be situations in which the presence of the prisoner is deemed essential or advisable.

In short, we see no reason why the courts should not be allowed to give due weight to the sworn affidavit of a member of the bar. Motions for a new

trial on grounds of newly discovered evidence may be determined on affidavits (*United States* v. *Johnson*, 327 U.S. 106) although courts frequently do order hearings where conflicting allegations cannot be resolved without hearing the witnesses. At least in the situation where a prisoner is accusing his own attorney, we think the same measure of discretion should be accorded to the district courts on motions under 28 U.S.C. 2255. This Court's opinions in *Machibroda* and in *Walker* v. *Johnston*, 312 U.S. 275, 287, should not, in our view, be read as precluding a district court from giving due weight to affidavits. On the records in those cases, this Court held that hearings were required. We respectfully suggest, however, that, in the situation at issue here, the sworn affidavit of a member of the bar is entitled to consideration, along with the prisoner's allegations, in a district court's determination of whether a hearing should be held.

CONCLUSION

For the reasons stated we respectfully submit that the judgment of the court below should be affirmed on the basis of this record, without prejudice to petitioner's right to have the matter considered further if he makes, under oath, specific allegations of fact to the effect that his attorney agreed to appeal his case

and led him to believe that the attorney was taking the steps necessary to do so.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
LAWRENCE G. WALLACE,
Assistant to the Solicitor General.
BEATRICE ROSENBERG,
LAWRENCE P. COHEN,
Attorneys.

MARCH 1969.

U. S. GOVERNMENT PRINTING OFFICE: 1969

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1968

No. 749

ADOLPHO RODRIQUEZ, *Petitioner,*

vs.

UNITED STATES, *Respondent.*

REPLY BRIEF FOR PETITIONER

It is apparent from the Brief for the United States that the Solicitor General has for all practical purposes abandoned the only reason given by the District Court and the Court of Appeals in denying petitioner's application and motion for relief under 28 U.S. C.A. 2255. The District Court and the Court of Appeals denied relief solely upon the ground that petitioner in his motion had failed to make a showing of "plain reversible error in the trial." This requirement of the Ninth Circuit is squarely in conflict with the other circuits which have passed upon the point and the Solicitor General in the Brief for the United States does not seriously urge that such a showing should be a prerequisite to relief under Section 2255. (Brief for the United States, p. 11.) In effect the Solicitor General concedes that the requirement of the Ninth Circuit is erroneous and that the rule established in the other circuits is correct.

The Solicitor General does argue that the District Court and the Court of Appeals did not err on the record before them, since they did not have the more detailed version of events set out in the Petition for Writ of Certiorari in this Court. (Brief for the United States pp. 6-7.) It seems clear, however, that even if the petitioner had set out the more detailed version in the documents in the Courts below, this would not in any way have affected the rulings of the District Court and the Court of Appeals, since their decisions are clearly based upon the "plain reversible error" requirement previously established in the Ninth Circuit.

The Solicitor General now argues only the mechanics to be followed to permit petitioner to obtain the relief sought. The Solicitor General would require that the petitioner file a new motion under Section 2255, supporting it with a sworn petition or affidavit. This seems a wholly unnecessary and formalistic requirement, since the allegations referred to have already been sworn to by the petitioner in his Petition for Writ of Certiorari in this Court. It is further suggested by the Solicitor General that even if this requirement is met, the Court need not in all cases order a hearing, but could determine his right to a hearing and deny it ex parte upon receipt of an affidavit of his former counsel. This suggestion would seem to be directly contrary to the statutory mandate contained in Section 2255:

> "Unless the motion and the files and records of the case *conclusively* show that the prisoner is entitled to no relief, the court shall cause notice

thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." (Emphasis added.)

The petitioner asks only that his right to appeal be restored, and that this be done upon a showing that he was wrongfully deprived of that right. The sole issue to be determined at such a hearing is whether the failure to file the written notice of appeal was or was not the result of the considered choice of the petitioner. Petitioner has alleged that he did want to appeal and so advised the interpreter and his attorney. Whether or not an oral notice of appeal was made in open court at the time of sentencing is wholly immaterial, since it would have been ineffective.

We have been furnished the reporter's partial transcript of the proceedings had at the time of judgment and have printed it as an appendix to this reply brief. This clearly supports petitioner's assertion that he wished to appeal and that he was deprived of the effective assistance of counsel during the critical 10-day period thereafter. It is quite apparent from the transcript that counsel (in moving for leave for petitioner and his wife to proceed in forma pauperis) was retiring from the case, but that petitioner wished to appeal. The motion would be wholly meaningless unless petitioner wished and intended to proceed further by way of appeal. The Court refused to entertain the motion at the time, stating that it was late in the morning and that all motions had to be in writing.

This motion by counsel not only showed that petitioner wished to appeal, but clearly indicated to the Court that counsel was retiring from the case and that from that moment the petitioner was without counsel. At that moment it was the duty of the Court under Rule 37(a) to advise the defendant of his right to appeal and to either appoint counsel or direct the clerk to prepare and file the necessary written notice of appeal.

It is respectfully submitted that under the circumstances the judgment shall be reversed and remanded to the District Court with instructions to grant to petitioner what the Solicitor General refers to as "in effect a late appeal". (Brief for the United States, p. 7.) The method of accomplishing this result is immaterial (i.e., whether by direct review or by vacating the sentence and resentencing petitioner). It is submitted, however, that in view of all the circumstances noted above, petitioner's desire to appeal was clear and that he should be permitted to do so without the necessity of a further hearing below.

Dated, San Francisco, California,
March 19, 1969.

Respectfully submitted,
WILLIAM ROSS WALLACE,
Counsel for Petitioner.

JOHN R. PASCOE,
WILLIAM R. RAY,
Of Counsel
On the Brief.

(Appendix Follows)

Appendix

In the United States District Court
For the Northern District of California
Northern Division

Before Hon. Thomas J. MacBride, Judge.

CR. No. 13,611

United States of America,
Plaintiff,

vs.

Adolpho Rodriquez, Etta Mae Rodriquez, Alberto Morales Amaro, Ramon Amaro Villa, Juan Bautista Barragan, and Francisca de Gontes Ceja,
Defendants.

REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS HAD AT TIME OF JUDGMENT

Appearances:

For the Government:	Cecil F. Poole, United States Attorney, By: Alan R. Porter-filed, Assistant United States Attorney.
For Defendants Adolpho and Etta Mae Rodriquez:	Paul J. Melee, Esq.
For Defendant Amaro:	Howard P. Welch, Esq.
For Defendant Barragan:	Paul A. Berg, Esq.

Sacramento, California, Thursday June 20, 1963;
9:30 Calendar

(Motions for Judgment of Acquittal and New Trial heard and denied.)

. . . . .

The Court: Now, as to the Defendant Adolpho Rodriquéz the sentence will be that he is to be confined to a penal institution to be selected by the Attorney General of the United States (interpreted) on each of the 11 counts for a period of 20 years (interpreted). I am sure that there are people who have been affected in their own lives and the lives of members of their family that would ask that these sentences run consecutively so that you would be put away for 220 years as far as they're concerned (interpreted), but I am pronouncing these sentences to run concurrently (interpreted).

As to the Defendant Barragan I sentence him to be confined to a penal institution to be selected by the Attorney General of the United States for a period of 15 years (interpreted), and again I would state to him that there are many, many persons, both in Government and out, victims, directly and indirectly, that would hope that these sentences would result in your being confined for a total of 60 years (interpreted), but these sentences are pronounced to run concurrently on each of the four counts (interpreted).

As to the Defendant Etta Rodriquez, she is to be confined to a penal institution to be selected by the Attorney General of the United States for a period

of nine years (interpreted) on each of the counts, the sentences to run concurrently.

As to the Defendant Amaro the defendant is to be confined to a penal institution to be selected by the Attorney General of the United States for a period of eight years (interpreted) on each of the counts, the sentences to run concurrently (interpreted).

The defendants are remanded to the custody of the Marshal to carry out the sentences.

Mr. Melee: If the Court please, I have one—I make the motion that the sentence commence on January 4th, 1963, your Honor. It's within the discretion of the Court.

The Court: I will grant that motion.

Mr. Melee: Thank you, your Honor.

Mr. Welch: That is for all defendants?

The Court: That will apply to all defendants.

Mr. Melee: If it please the Court, I have one other motion I would like to make, a motion——

The Court: Just a minute. Let's have the defendants in here if you are going to make a motion. What is it?

Mr. Melee: It is just proceeding in forma pauperis oath in behalf of Adolpho Rodriquez and Etta Rodriquez while they are before the Court. Hereafter if they are transported away we would have to have them returned to make the motion before the Court.

The Court: No, I don't wish to take up that motion at this time. It is five minutes after twelve. We have taken all morning on it. I have no idea what

your motion is. All motions also have to be in writing in this Court anyway as you know, Mr. Melee.

Mr. Melee: Yes, your Honor. All right.

(Adjournment taken.)

Certificate of Reporter

I, Audrey L. McCarthy, Official Reporter, United States District Court, do hereby certify that as such reporter I reported in Stenotype the proceedings had at the time of pronouncement of judgment in Cr. No. 13611, United States of America v. Adolpho Rodriquez, et al., and that the foregoing transcript, consisting of pages numbered 1 to 4, inclusive, is a full, true and correct transcript of the actual sentencing and the proceedings had after the sentencing.

Dated: December 23, 1968.

Audrey L. McCarthy
Official Reporter

SUPREME COURT OF THE UNITED STATES

No. 749.—October Term, 1968.

Adolpho Rodriquez, Petitioner, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June 2, 1969.]

Mr. Justice Marshall delivered the opinion of the Court.

Petitioner brought this suit for post-conviction relief under 28 U. S. C. § 2255, alleging that after his convictoin on several narcotics charges he had been improperly denied his right to appeal. Petitioner was sentenced to 11 concurrent 20-year terms on June 20, 1963. Immediately after the sentencing, petitioner's retained counsel attempted to make a motion requesting leave for petitioner to proceed *in forma pauperis*. The trial judge cut petitioner's counsel off, saying that all motions had to be in writing. Without making any further inquiry, he adjourned the court. No written motions were ever filed, and petitioner's counsel did not submit a notice of appeal within the 10-day period specified by the applicable rules.[1] On August 7, 1963, after the time had expired, petitioner attempted to file a notice of appeal himself. He declared that an oral notice had been given at trial. The trial judge ruled that the expiration of the appeal period deprived the court of jurisdiction. Petitioner then sought relief in the Court of Appeals for the Ninth Circuit. He alleged that he had told his counsel to perfect an appeal, but that counsel had failed to do so. The Ninth Circuit denied petitioner's motion for lack of jurisdiction, citing *United States* v. *Robinson*, 361 U. S. 220 (1960). It also refused habeas corpus.

[1] Fed. Rule Crim. Proc. 37 (a), now Fed. Rule App. Proc. 4 (b).

This action was commenced on February 15, 1966. Petitioner alleged that he was of Mexican descent and that his knowledge of English was limited. He further contended that his retained counsel had fraudulently deprived him of his right to appeal. He asked that his conviction be set aside and that he be resentenced so that he could properly take an appeal. The District Court for the Northern District of California denied petitioner's application and the Ninth Circuit affirmed. 387 F. 2d 117 (C. A. 9th Cir. 1967). Both courts relied on a Ninth Circuit rule requiring applicants in petitioner's position to disclose what errors they would raise on appeal and to demonstrate that denial of an appeal had caused prejudice. We granted certiorari to resolve a conflict among the circuits about the propriety of such a requirement.[1] 393 U. S. 951 (1968). We reverse.

I.

As this Court has noted before, "[p]resent federal law has made an appeal from a District Court's judgment of conviction in a criminal case what is, in effect, a matter

[1] The Ninth Circuit rule originated in two 1964 decisions, *Wilson* v. *United States*, 338 F. 2d 54, and *Miller* v. *United States*, 339 F. 2d 581. Cf. *McGarry* v. *Fogliani*, 370 F. 2d 42 (C. A. 9th Cir. 1966). The First Circuit has adopted an intermediate position; the defendant is not required to show plain reversible error in his application, but the Government may defeat relief by showing that an appeal would be futile. *Desmond* v. *United States*, 333 F. 2d 378 (1964). Both petitioner and the Government attempt to find support in the position of the Tenth Circuit. *Hannigan* v. *United States*, 341 F. 2d 587 (1965). The Fifth, Sixth, Seventh, Eighth, and District of Columbia Circuits do not require any showing about the issues to be raised on appeal. *Camp* v. *United States*, 352 F. 2d 800 (C. A. 5th Cir. 1965); *United States* v. *Smith*, 387 F. 2d 268 (C. A. 6th Cir. 1967); *Calland* v. *United States*, 323 F. 2d 405 (C. A. 7th Cir. 1963); *Williams* v. *United States*, 402 F. 2d 548 (C. A. 8th Cir. 1968); *Dillane* v. *United States*, 122 App. D. C. 241, 350 F. 2d 732 (C. A. D. C. Cir. 1965).

of right." *Coppedge* v. *United States*, 369 U. S. 438, 441 (1962). The Ninth Circuit seems to require an applicant under 28 U. S. C. § 2255 to show more than a simple deprivation of this right before relief can be accorded. It also requires him to show some likelihood of success on appeal; if the applicant is unlikely to succeed, the Ninth Circuit would characterize any denial of the right to appeal as a species of harmless error. We cannot subscribe to this approach.

Applicants for relief under § 2255 must, if indigent, prepare their petitions without the assistance of counsel. See *Johnson* v. *Avery*, 393 U. S. 483, 487–488 (1969). Those whose education has been limited and those, like petitioner, who lack facility with the English language might have grave difficulty in making even a summary statement of points to be raised on appeal. Moreover, they may not even be aware of errors which occurred at trial. They would thus be deprived of their only chance to take an appeal even though they have never had the assistance of counsel in preparing one. Like the approach rejected long ago in *Powell* v. *Alabama*, 287 U. S. 45, 69 (1932), the Ninth Circuit's requirement makes an indigent defendant face "the danger of conviction because he does not know how to establish his innocence." Moreover, the Ninth Circuit rule would require the sentencing court to screen out supposedly unmeritorious appeals in ways this Court rejected in *Coppedge*. Those whose right to appeal has been frustrated should be treated exactly like any other appellants; they should not be given an additional hurdle to clear just because their rights were violated at some earlier stage in the proceedings. Accordingly, we hold that the courts below erred in rejecting petitioner's application for relief because of his failure to specify the points he would raise were his right to appeal reinstated.

II.

The Government, while not arguing that the courts below properly denied relief on the pleadings, urges us to remand this case for a truncated factual hearing. Drawing upon this Court's recognition in *Machibroda* v. *United States*, 368 U. S. 487, 495 (1962), that the hearing requirement of § 2255 "does not strip the district courts of all discretion to exercise their common sense," the Government suggests that the District Court be instructed to obtain an affidavit from petitioner's trial attorney explaining why no notice of appeal was filed. This explanation, together with petitioner's allegations, would be used to judge the propriety of a hearing.

This issue was not present in this case when certiorari was granted and we do not think it is present now. For we think it "just under the circumstances," 28 U. S. C. § 2106, for us to dispose of petitioner's arguments finally at this stage. Six years have now elapsed since petitioner was sentenced, and we do not see how further delay and further prolonged proceedings would serve the cause of justice. Moreover, it appears from the trial transcript in this case that the trial judge erroneously failed to advise petitioner of his right to appeal. At the time of trial, Fed. Rule Crim. Proc. 37 (a)(2) required the sentencing judge to inform unrepresented defendants of their right to appeal; the clerk upon request was required to file a notice of appeal for the defendant.[3] Counsel's attempt to

[3] Rule 37 (a)(2) provided:

"When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant."

This provision has since been transferred to Rule 32 (a)(2). It now applies to defendants going to trial on a plea of not guilty,

obtain leave for petitioner to proceed *in forma pauperis* should have put the trial judge on notice that petitioner would be unrepresented in the future. Moreover, unless an appeal was contemplated, there would be no reason to make such a motion. As the trial judge should have recognized, petitioner was therefore precisely the kind of defendant who needed the protection afforded by the rule. Had he known that the clerk would file a notice of appeal for him, he could easily have avoided the difficulties he has faced. At the very least, the trial judge should have inquired into the circumstances surrounding the attempt to make the *in forma pauperis* motion. His failure to do so effectively deprived petitioner of his right to appeal. Since this deprivation appears on the record before us, we see no need for any factual determinations on remand. Cf. *United States* v. *Smith*, 387 F. 2d 268 (C. A. 6th Cir. 1967).

The judgment is reversed and the case is remanded to the District Court where petitioner should be resentenced so that he may perfect an appeal in the manner prescribed by the applicable rules.

It is so ordered.

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whether or not they are represented by counsel. The problem of determining whether to give notice to a person represented at trial, but who may not be represented on appeal, will therefore not recur.

SUPREME COURT OF THE UNITED STATES

No. 749.—October Term, 1968.

Adolpho Rodriquez, Petitioner, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June 2, 1969.]

Mr. Justice Harlan, concurring in part and dissenting in part.

I agree with Part I of the Court's opinion, but cannot subscribe to Part II, in which the Court reinstates petitioner's right to appeal without further proceedings below. In taking this course I think the Court has been too insensitive to what, on this record, is due the trial judge, petitioner's trial counsel, and the orderly administration of the criminal process.

In my opinion, this record does not show that petitioner was wrongfully denied an opportunity to appeal. It appears from the record that immediately following petitioner's sentencing his lawyer indicated orally that petitioner wished to appeal *in forma pauperis*, and that the judge informed the lawyer that "all motions" had to be made in writing. Thereafter no written notice of appeal was filed within the 10-day limit. Petitioner further *alleges* that he told his counsel to perfect an appeal and that counsel neglected to do so, but those allegations have never been tested by the adversary process.

The Court undertakes to justify its decision not to require a hearing and findings on this score by characterizing as "error" the sentencing judge's failure "to advise petitioner of his right to appeal," as then supposedly required by Fed. Rule Crim. Proc. 37 (a)(2), and by

concluding that it is "just under the circumstances," 28 U. S. C. § 2106, to dispose of the case at this level. See *ante*, at 4–5.

Although I share the Court's concern that petitioner receive promptly all relief which is legally due him, I am unable to accept either this attribution of "error" to the trial judge or this bypassing of established methods for determining the truth of factual allegations. At the time petitioner was sentenced, Rule 37 (a)(2) required that a sentencing judge advise only "a defendant *not represented by counsel*" of his right to appeal.[1] (Emphasis supplied.) In this instance, petitioner was represented by retained counsel both at trial and at sentencing. The excerpts from the trial transcript upon which the Court relies contain nothing at all to rebut the natural inference, apparently drawn by the sentencing judge, that petitioner's counsel would continue to represent him at least for the purpose of filing a notice of appeal. Indeed, petitioner's own statement of the facts reveals that this inference was wholly justified, for petitioner asserts that after his sentencing "his counsel advised both him and his wife that he would arrange for their appeals."[2] Thus, even if it is assumed that "the trial judge should have inquired into the circumstances surrounding the attempt to make the *in forma pauperis* motion," *ante*, at 5, the judge's omission was surely at most harmless error.

I would therefore remand the case to the District Court, so that it may be determined whether petitioner in fact did instruct his attorney to perfect an appeal and whether the attorney in fact neglected to do so.

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[1] This provision was subsequently amended to require that the judge so advise all defendants, whether or not represented by counsel. See *ante*, at 4, n. 3. See also *Peoples* v. *United States*, 337 F. 2d 91 (1964); *Calland* v. *United States*, 323 F. 2d 405 (1963); *Boruff* v. *United States*, 310 F. 2d 918 (1962).

[2] Brief for Petitioner 6.

This course seems to me to be required both in the interest of orderly procedure and in fairness to petitioner's trial attorney.

Furthermore, as suggested by the Government, I would permit the District Court discretion to begin by obtaining an affidavit from petitioner's attorney in response to petitioner's allegations. Who knows whether the attorney may not have in his possession documentary evidence conclusively showing the allegations to be unfounded? Or who knows whether the attorney may not wish to concede the accuracy of the allegations? In either case, the affidavit procedure might obviate the necessity for a full-blown hearing. If the attorney has no documentary evidence, and if his affidavit reveals a factual controversy, then of course a hearing would be required. Such a procedure entirely fits the language of 28 U. S. C. § 2255 and this Court's statement in *Machibroda* v. *United States*, 368 U. S. 487, 495 (1962), that § 2255 "does not strip the district courts of all discretion to exercise their common sense."